

AMENDED IN ASSEMBLY APRIL 8, 2010

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

ASSEMBLY BILL

No. 2597

Introduced by Assembly Member Bill Berryhill

February 19, 2010

An act to amend Section 11713.3 of the Vehicle Code, relating to vehicles.

LEGISLATIVE COUNSEL'S DIGEST

AB 2597, as amended, Bill Berryhill. Vehicles: manufacturers and distributors.

Existing

(1) Existing law generally requires a manufacturer branch, remanufacturer, remanufacturer branch, distributor, distributor branch, transporter, or dealer of vehicles to be licensed by the Department of Motor Vehicles. Under existing law, it is unlawful for a manufacturer, manufacturer branch, distributor, or distributor branch to engage in certain conduct, among other things, dishonor a warranty, rebate, or other incentive offered to the public or a dealer, as specified, or to unfairly discriminate in favor of a dealership owned or controlled, in whole or part, by a manufacturer or an entity that controls or is controlled by a manufacturer or distributor.

This bill would additionally prohibit a manufacturer, manufacturer branch, distributor, or distributor branch from offering or attempting to offer a customer or dealer rebate, discount, promotional financing, or other incentive to promote the retail sale or lease of a motorsports vehicle, as defined, that is subject to specified conditions, from unfairly discriminating in favor of a dealer when acting as a manufacturer, manufacturer branch, or distributor of motorsports vehicles, and from

requiring or attempting to require a dealer to maintain a motorsports inventory in a specified manner.

(2) Under existing law, a violation of the above provisions relating to occupational licensing and business regulations in the Vehicle Code is a misdemeanor.

Because this bill would create a new crime, it would impose a state-mandated local program.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

~~This bill would make technical, nonsubstantive changes in those provisions.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.
State-mandated local program: ~~no~~-yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 11713.3 of the Vehicle Code is amended
2 to read:

3 11713.3. It is unlawful and a violation of this code for a
4 manufacturer, manufacturer branch, distributor, or distributor
5 branch licensed under this code to do any of the following:

6 (a) To refuse or fail to deliver in reasonable quantities and within
7 a reasonable time after receipt of an order from a dealer having a
8 franchise for the retail sale of a new vehicle sold or distributed by
9 the manufacturer or distributor a new vehicle or parts or accessories
10 to new vehicles as are covered by the franchise, if the vehicle,
11 parts, or accessories are publicly advertised as being available for
12 delivery or actually being delivered. This subdivision is not
13 violated, however, if the failure is caused by acts or causes beyond
14 the control of the manufacturer, manufacturer branch, distributor,
15 or distributor branch.

16 (b) To prevent or require, or attempt to prevent or require, by
17 contract or otherwise, a change in the capital structure of a
18 dealership or the means by or through which the dealer finances
19 the operation of the dealership, if the dealer at all times meets any
20 reasonable capital standards agreed to by the dealer and the

1 manufacturer or distributor, and if a change in capital structure
2 does not cause a change in the principal management or have the
3 effect of a sale of the franchise without the consent of the
4 manufacturer or distributor.

5 (c) To prevent or require, or attempt to prevent or require, a
6 dealer to change the executive management of a dealership, other
7 than the principal dealership operator or operators, if the franchise
8 was granted to the dealer in reliance upon the personal
9 qualifications of that person.

10 (d) (1) Except as provided in subdivision (t), to prevent or
11 require, or attempt to prevent or require, by contract or otherwise,
12 a dealer, or an officer, partner, or stockholder of a dealership, the
13 sale or transfer of any part of the interest of any of them to any
14 other person. No dealer, officer, partner, or stockholder shall,
15 however, have the right to sell, transfer, or assign the franchise,
16 or any right thereunder, without the consent of the manufacturer
17 or distributor except that the consent shall not be unreasonably
18 withheld.

19 (2) (A) For the transferring franchisee to fail, prior to the sale,
20 transfer, or assignment of a franchisee or the sale, assignment, or
21 transfer of all, or substantially all, of the assets of the franchised
22 business or a controlling interest in the franchised business to
23 another person, to notify the manufacturer or distributor of the
24 franchisee's decision to sell, transfer, or assign the franchise. The
25 notice shall be in writing and shall include all of the following:

26 (i) The proposed transferee's name and address.

27 (ii) A copy of all of the agreements relating to the sale,
28 assignment, or transfer of the franchised business or its assets.

29 (iii) The proposed transferee's application for approval to
30 become the successor franchisee. The application shall include
31 forms and related information generally utilized by the
32 manufacturer or distributor in reviewing prospective franchisees
33 if those forms are readily made available to existing franchisees.
34 As soon as practicable after receipt of the proposed transferee's
35 application, the manufacturer or distributor shall notify the
36 franchisee and the proposed transferee of any information needed
37 to make the application complete.

38 (B) For the manufacturer or distributor, to fail, on or before 60
39 days after the receipt of all of the information required pursuant
40 to subparagraph (A), or as extended by a written agreement

1 between the manufacturer or distributor and the franchisee, to
2 notify the franchisee of the approval or the disapproval of the sale,
3 transfer, or assignment of the franchise. The notice shall be in
4 writing and shall be personally served or sent by certified mail,
5 return receipt requested, or by guaranteed overnight delivery
6 service that provides verification of delivery and shall be directed
7 to the franchisee. Any proposed sale, assignment, or transfer shall
8 be deemed approved, unless disapproved by the franchisor in the
9 manner provided by this subdivision. If the proposed sale,
10 assignment, or transfer is disapproved, the franchisor shall include
11 in the notice of disapproval a statement setting forth the reasons
12 for the disapproval.

13 (3) In an action in which the manufacturer's or distributor's
14 withholding of consent under this subdivision or subdivision (e)
15 is an issue, whether the withholding of consent was unreasonable
16 is a question of fact requiring the consideration of all the existing
17 circumstances.

18 (e) To prevent, or attempt to prevent, a dealer from receiving
19 fair and reasonable compensation for the value of the franchised
20 business. There shall be no transfer or assignment of the dealer's
21 franchise without the consent of the manufacturer or distributor,
22 which consent shall not be unreasonably withheld or conditioned
23 upon the release, assignment, novation, waiver, estoppel, or
24 modification of a claim or defense by the dealer.

25 (f) To obtain money, goods, services, or any other benefit from
26 a person with whom the dealer does business, on account of, or in
27 relation to, the transaction between the dealer and that other person,
28 other than for compensation for services rendered, unless the
29 benefit is promptly accounted for, and transmitted to, the dealer.

30 (g) To require a dealer to prospectively assent to a release,
31 assignment, novation, waiver, or estoppel that would relieve a
32 person from liability to be imposed by this article or to require a
33 controversy between a dealer and a manufacturer, distributor, or
34 representative, to be referred to a person other than the board, if
35 the referral would be binding on the dealer. This subdivision does
36 not, however, prohibit arbitration before an independent arbitrator.

37 (h) To increase prices of motor vehicles that the dealer had
38 ordered for private retail consumers prior to the dealer's receipt
39 of the written official price increase notification. A sales contract
40 signed by a private retail consumer is evidence of this order. In

1 the event of manufacturer price reductions, the amount of the
2 reduction received by a dealer shall be passed on to the private
3 retail consumer by the dealer if the retail price was negotiated on
4 the basis of the previous higher price to the dealer. Price reductions
5 apply to all vehicles in the dealer's inventory that were subject to
6 the price reduction. Price differences applicable to new model or
7 series motor vehicles at the time of the introduction of the new
8 models or series shall not be considered a price increase or price
9 decrease. This subdivision does not apply to price changes caused
10 by either of the following:

11 (1) The addition to a motor vehicle of required or optional
12 equipment pursuant to state or federal law.

13 (2) Revaluation of the United States dollar in the case of a
14 foreign-make vehicle.

15 (i) To fail to pay to a dealer, within a reasonable time following
16 receipt of a valid claim made by the dealer, a payment agreed to
17 be made by the manufacturer or distributor to the dealer by reason
18 of the fact that a new vehicle of a prior year model is in the dealer's
19 inventory at the time of introduction of new model vehicles.

20 (j) To deny the widow or heirs designated by a deceased owner
21 of a dealership the opportunity to participate in the ownership of
22 the dealership or successor dealership under a valid franchise for
23 a reasonable time after the death of the owner.

24 (k) To offer refunds or other types of inducements to a person
25 for the purchase of new motor vehicles of a certain line-make to
26 be sold to the state or a political subdivision of the state without
27 making the same offer to all other dealers in the same line-make
28 within the relevant market area.

29 (l) To modify, replace, enter into, relocate, terminate, or refuse
30 to renew a franchise in violation of Article 4 (commencing with
31 Section 3060) of Chapter 6 of Division 2.

32 (m) To employ a person as a representative who has not been
33 licensed pursuant to Article 3 (commencing with Section 11900)
34 of Chapter 4 of Division 5.

35 (n) To deny any dealer the right of free association with any
36 other dealer for a lawful purpose.

37 (o) (1) To compete with a dealer in the same line-make
38 operating under an agreement or franchise from a manufacturer
39 or distributor in the relevant market area.

(2) A manufacturer, branch, or distributor or an entity that controls or is controlled by a manufacturer, branch, or distributor, shall not be deemed to be competing in the following limited circumstances:

(A) Owning or operating a dealership for a temporary period, not to exceed one year. However, after a showing of good cause by a manufacturer, branch, or distributor that it needs additional time to operate a dealership in preparation for sale to a successor independent franchisee, the board may extend the time period. The board shall extend the time period until December 31, 2002, for a manufacturer that meets all of the following requirements:

(i) The manufacturer has no more than 25 franchisees in the state and those franchisees collectively operate dealership facilities in at least 15 counties of the state.

(ii) All of the dealership facilities operated by the manufacturer's franchisees in the state trade exclusively in the manufacturer's line-make.

(iii) No fewer than one-half of the manufacturer's franchisees in the state own and operate two or more dealership facilities in their assigned areas of responsibility.

(iv) The manufacturer holds a temporary ownership interest in no more than two dealerships in the state that are located in the relevant market area of any other franchisee of the same line-make not owned, in whole or part, by the manufacturer.

(B) Owning an interest in a dealer as part of a bona fide dealer development program that satisfies all of the following requirements:

(i) The sole purpose of the program is to make franchises available to persons lacking capital, training, business experience, or other qualities ordinarily required of prospective franchisees and the dealer development candidate is an individual who is unable to acquire the franchise without assistance of the program.

(ii) The dealer development candidate has made a significant investment subject to loss in the franchised business of the dealer.

(iii) The program requires the dealer development candidate to manage the day-to-day operations and business affairs of the dealer and to acquire, within a reasonable time and on reasonable terms and conditions, beneficial ownership and control of a majority interest in the dealer and disassociation of a direct or indirect ownership or control by the manufacturer, branch, or distributor.

1 (C) Owning a wholly owned subsidiary corporation of a
2 distributor that sells motor vehicles at retail, if, for at least three
3 years prior to January 1, 1973, the subsidiary corporation has been
4 a wholly owned subsidiary of the distributor and engaged in the
5 sale of vehicles at retail.

6 (3) (A) A manufacturer, branch, and distributor that owns or
7 operates a dealership in the manner described in subparagraph (A)
8 of paragraph (2) shall give written notice to the board, within 10
9 days, each time it commences or terminates operation of a
10 dealership and each time it acquires or divests itself of an
11 ownership interest.

12 (B) A manufacturer, branch, and distributor that owns an
13 interest in a dealer in the manner described in subparagraph (B)
14 of paragraph (2) shall give written notice to the board, annually,
15 of the name and location of each dealer in which it has an
16 ownership interest.

17 (p) To unfairly discriminate among its franchisees with respect
18 to warranty reimbursement or authority granted to its franchisees
19 to make warranty adjustments with retail customers.

20 (q) To sell vehicles to persons not licensed under this chapter
21 for resale.

22 (r) To fail to affix an identification number to a park trailer, as
23 described in Section 18009.3 of the Health and Safety Code, that
24 is manufactured on or after January 1, 1987, and that does not
25 clearly identify the unit as a park trailer to the department. The
26 configuration of the identification number shall be approved by
27 the department.

28 (s) To dishonor a warranty, rebate, or other incentive offered
29 to the public or a dealer in connection with the retail sale of a new
30 motor vehicle, based solely upon the fact that an autobroker
31 arranged or negotiated the sale. This subdivision does not prohibit
32 the disallowance of that rebate or incentive if the purchaser or
33 dealer is ineligible to receive the rebate or incentive pursuant to
34 any other term or condition of a rebate or incentive program.

35 (t) To exercise a right of first refusal or any other right requiring
36 a franchisee or owner of a franchise to sell, transfer, or assign to
37 the franchisor, or to a nominee of the franchisor, all or a material
38 part of the franchised business or of the assets of that business
39 unless all of the following requirements are met:

1 (1) The franchise authorizes the franchisor to exercise a right
2 of first refusal to acquire the franchised business or assets of that
3 business in the event of a proposed sale, transfer, or assignment.

4 (2) The franchisor gives written notice of its exercise of the
5 right of first refusal no later than 45 days after the franchisor
6 receives all of the information required pursuant to subparagraph
7 (A) of paragraph (2) of subdivision (d).

8 (3) The sale, transfer, or assignment being proposed relates to
9 not less than all or substantially all of the assets of the franchised
10 business or to a controlling interest in the franchised business.

11 (4) The proposed transferee is neither a family member of an
12 owner of the franchised business, nor a managerial employee of
13 the franchisee owning 15 percent or more of the franchised
14 business, nor a corporation, partnership, or other legal entity owned
15 by the existing owners of the franchised business. For purposes of
16 this paragraph, a “family member” means the spouse of an owner
17 of the franchised business, the child, grandchild, brother, sister,
18 or parent of an owner, or a spouse of one of those family members.
19 This paragraph does not limit the rights of the franchisor to
20 disapprove a proposed transferee as provided in subdivision (d).

21 (5) Upon the franchisor’s exercise of the right of first refusal,
22 the consideration paid by the franchisor to the franchisee and
23 owners of the franchised business shall equal or exceed all
24 consideration that each of them were to have received under the
25 terms of, or in connection with, the proposed sale, assignment, or
26 transfer, and the franchisor shall comply with all the terms and
27 conditions of the agreement or agreements to sell, transfer, or
28 assign the franchised business.

29 (6) The franchisor shall reimburse the proposed transferee for
30 expenses paid or incurred by the proposed transferee in evaluating,
31 investigating, and negotiating the proposed transfer to the extent
32 those expenses do not exceed the usual, customary, and reasonable
33 fees charged for similar work done in the area in which the
34 franchised business is located. These expenses include, but are not
35 limited to, legal and accounting expenses and expenses incurred
36 for title reports and environmental or other investigations of real
37 property on which the franchisee’s operations are conducted. The
38 proposed transferee shall provide the franchisor with a written
39 itemization of those expenses and a copy of all nonprivileged
40 reports and studies for which expenses were incurred, if any, within

1 30 days of the proposed transferee's receipt of a written request
2 from the franchisor for that accounting. The franchisor shall make
3 payment within 30 days of exercising the right of first refusal.

4 (u) (1) To unfairly discriminate in favor of any dealership
5 owned or controlled, in whole or part, by a manufacturer or
6 distributor or an entity that controls or is controlled by the
7 manufacturer or distributor. Unfair discrimination includes, but is
8 not limited to, the following:

9 (A) The furnishing to a franchisee or dealer that is owned or
10 controlled, in whole or part, by a manufacturer, branch, or
11 distributor of any of the following:

12 (i) A vehicle that is not made available to each franchisee
13 pursuant to a reasonable allocation formula that is applied
14 uniformly, and a part or accessory that is not made available to all
15 franchisees on an equal basis when there is no reasonable allocation
16 formula that is applied uniformly.

17 (ii) A vehicle, part, or accessory that is not made available to
18 each franchisee on comparable delivery terms, including the time
19 of delivery after the placement of an order. Differences in delivery
20 terms due to geographic distances or other factors beyond the
21 control of the manufacturer, branch, or distributor shall not
22 constitute unfair competition.

23 (iii) Information obtained from a franchisee by the
24 manufacturer, branch, or distributor concerning the business affairs
25 or operations of a franchisee in which the manufacturer, branch,
26 or distributor does not have an ownership interest. The information
27 includes, but is not limited to, information contained in financial
28 statements and operating reports, the name, address, or other
29 personal information or buying, leasing, or service behavior of a
30 dealer customer, and any other information which, if provided to
31 a franchisee or dealer owned or controlled by a manufacturer or
32 distributor, would give that franchisee or dealer a competitive
33 advantage. This clause does not apply if the information is provided
34 pursuant to a subpoena or court order, or to aggregated information
35 made available to all franchisees.

36 (B) Referring a prospective purchaser or lessee to a dealer in
37 which a manufacturer, branch, or distributor has an ownership
38 interest, unless the prospective purchaser or lessee resides in the
39 area of responsibility assigned to that dealer or the prospective
40 purchaser or lessee requests to be referred to that dealer.

(2) This subdivision does not prohibit a franchisor from granting a franchise to prospective franchisees or assisting those franchisees during the course of the franchise relationship as part of a program or programs to make franchises available to persons lacking capital, training, business experience, or other qualifications ordinarily required of prospective franchisees.

(v) (1) To access, modify, or extract information from a confidential dealer computer record, as defined in Section 11713.25, without obtaining the prior written consent of the dealer and without maintaining administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of the information.

(2) Paragraph (1) does not limit a duty that a dealer may have to safeguard the security and privacy of records maintained by the dealer.

(w) (1) To use electronic, contractual, or other means to prevent or interfere with any of the following:

(A) The lawful efforts of a dealer to comply with federal and state data security and privacy laws.

(B) The ability of a dealer to do either of the following:

(i) Ensure that specific data accessed from the dealer's computer system is within the scope of consent specified in subdivision (v).

(ii) Monitor specific data accessed from or written to the dealer's computer system.

(2) Paragraph (1) does not limit a duty that a dealer may have to safeguard the security and privacy of records maintained by the dealer.

(x) (1) *To offer or attempt to offer a customer or dealer rebate, discount, promotional financing, or other incentive to promote the retail sale or lease of motorsports vehicles that is conditioned on one or more of the following:*

(A) *The purchase by the selling dealer of a minimum number of motorsports vehicles.*

(B) *The selling dealer maintaining a minimum number of motorsports vehicles in inventory.*

(C) *The date that the selling dealer acquired the motorsports vehicles eligible for the incentive.*

(2) *To unfairly discriminate in favor of a dealer when acting as a manufacturer, manufacturer branch, distributor, or distributor*

1 *branch of motorsports vehicles. Unfair discrimination includes*
2 *all of the following:*

3 *(A) Furnishing to a dealer any of the following:*

4 *(i) A vehicle, part, or accessory that is not made available to*
5 *all dealers at the same actual price and pursuant to a reasonable*
6 *allocation formula applied uniformly and not based on the*
7 *inventory size or purchasing history or volume of the dealer.*

8 *(ii) A vehicle, part, or accessory that is not made available to*
9 *all dealers on comparable financing and delivery terms, including*
10 *the time of delivery after the placement of an order. Differences*
11 *in delivery terms due to geographic distances or other factors*
12 *beyond the control of the manufacturer, branch, or distributor*
13 *shall not constitute unfair discrimination.*

14 *(B) Referring a prospective purchaser or lessee to a dealer*
15 *unless the prospective purchaser or lessee resides in the area of*
16 *responsibility assigned to that dealer or the prospective purchaser*
17 *or lessee requests to be referred to that dealer.*

18 *(3) To require or attempt to require a dealer to maintain a*
19 *motorsports vehicle inventory in excess of a reasonable minimum*
20 *requirement not to exceed a 60-day supply based on the rate of*
21 *sales of the dealer for the preceding 90 days.*

22 *(4) For purposes of this subdivision, a “motorsports vehicle”*
23 *means a motorcycle, motor-driven cycle, motorized scooter,*
24 *motorized bicycle, all-terrain vehicle, or a snowmobile.*

25 ~~(x)~~

26 *(y) As used in this section, “area of responsibility” is a*
27 *geographic area specified in a franchise that is used by the*
28 *franchisor for the purpose of evaluating the franchisee’s*
29 *performance of its sales and service obligations.*

30 *SEC. 2. No reimbursement is required by this act pursuant to*
31 *Section 6 of Article XIII B of the California Constitution because*
32 *the only costs that may be incurred by a local agency or school*
33 *district will be incurred because this act creates a new crime or*
34 *infraction, eliminates a crime or infraction, or changes the penalty*
35 *for a crime or infraction, within the meaning of Section 17556 of*
36 *the Government Code, or changes the definition of a crime within*
37 *the meaning of Section 6 of Article XIII B of the California*
38 *Constitution.*